SUPREME COURT, U. S.

In the Supreme Court of the United States

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OCTOBER TERM, 1967

No. 846

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and PETER E. MITCHELL, WILLIAM M. BENNETT, A. W. GATOV, WILLIAM SYMONS, JR. and FRED P. MORRISSEY, as Members thereof,

Appellants,

vs.

BALTIMORE SHIPPERS AND RECEIVERS ASSOCIATION, INC., THE CHARTER OAK SHIPPERS COOPERATIVE ASSOCIATION, INC., INDUSTRIAL SHIPPERS ASSOCIATION, INC., UNITED SHIPPERS ASSOCIATION, INC., CHARLES J. WORTH DRAYAGE COMPANY, LOS ANGELES WHOLESALE INSTITUTE, G. I. TRUCKING COMPANY, REDWAY TRUCK AND WAREHOUSE COMPANY,

Appellees.

On Appeal from the United States District Court for the Northern District of California

Jurisdictional Statement

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Jurisdictional Statement

OPINION BELOW

The opinion of the District Court for the Northern District of California was issued on May 23, 1967 and is

reported at 268 Federal Supplement 836. A copy of said opinion, which includes the Court's findings of fact and conclusions of law, and the Court's Judgment and Order filed September 7, 1967 are printed in Appendix A, *infra*.

JURISDICTION

1. The ground upon which jurisdiction of this Court is invoked is that this is an appeal from the judgment of a three-judge District Court of the United States (convened pursuant to 28 U.S.C. 2281) in three consolidated actions seeking a declaration that sections 3664, 3667 and 4013 of the Public Utilities Code of the State of California are unconstitutional and void as applied to interstate commerce, and requesting injunctive relief restraining the Public Utilities Commission of the State of California from taking any action under said statutes.

2. The date of entry of the judgment sought to be reviewed is September 7, 1967. There was no petition, application or request for rehearing. A Notice of Appeal to the Court of Appeals, Ninth Judicial Circuit, was filed in the United States District Court, Northern District of California, on September 29, 1967. A Notice of Appeal to this Court was filed in the United States District Court, Northern District of California on September 29, 1967.

3. The statutory provision believed to confer jurisdiction of this appeal on this Court is 28 U.S.C. 1253.

4. Cases believed to sustain that jurisdiction are: *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960); *Campbell v. Husey*, 368 U.S. 297 (1961); *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962); *Public Utilities Commission of California v. United Air Lines*, 346 U.S. 402 (1953).

STATUTES INVOLVED

The State statutory provisions in question are sections 3664, 3667 and 4013 of the California Public Utilities Code (Cal. Stats. 1951, c. 764, pp. 2118, 2119 and 2129). They are set forth below. Additional sections of the California Public Utilities Code involved are set forth in Appendix "B".

"3664. It is unlawful for any highway permit carrier to charge or collect any lesser rate than the minimum rate or greater rate than the maximum rate established by the commission under this article."

"3667. No highway permit carrier shall charge, demand, collect or receive for the transportation of property, or for any service in connection therewith, rates or charges less than the minimum rates and charges or greater than the maximum rates and charges applicable to such transportation established or approved by the commission; nor shall any such carrier directly or indirectly pay any commission or refund, or remit in any manner or by any device any portion of the rates or charges so specified, except upon authority of the Commission."

"4013. It is unlawful for any carrier to charge or collect any lesser rate than the minimum rate or greater rate than the maximum rate established by the commission under this article."

The following portions of the Constitution of the United States are also involved:

ARTICLE I

Section 8. The Congress shall have Power . . .

[Cl. 3] to regulate commerce with foreign nations, and among the several states and with the Indian Tribes;

ARTICLE VI

[par. 2] This Constitution and the Laws of the United States which shall be made in Pursuance

thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal statutes, viz. the Interstate Commerce Act, as set forth in Appendix "C" in pertinent part, are also involved.

QUESTIONS PRESENTED

A. Did Congress intend, by the enactment of Parts II (49 U.S.C. 301-327) and IV (49 U.S.C. 1001-1022) of the Interstate Commerce Act, to preclude the States from economic regulation of interstate transportation performed by motor carriers for nonprofit shippers associations wholly within "commercial zones"?[1]

B. Does the application of California's minimum rates to interstate transportation performed by motor carriers for nonprofit shipper associations wholly within "commer-

1. "Commercial zone" is the term used by the Interstate Commerce Commission to designate the area exempted from Federal regulation by 49 U.S.C. 303(b)(8).

cial zones" impose an unreasonable burden upon interstate commerce in violation of the commerce clause of the Constitution of the United States?

STATEMENT OF THE CASE

Appellants (hereinafter referred to as the "Commission") are a body duly constituted, with its jurisdiction prescribed by the Constitution and Statutes of the State of California for the purpose, among others, of regulating the intrastate rates, and interstate rates when permitted under the Constitution and laws of the United States, of commercial carriers of property between points in the State of California.

Background

The Commission has prescribed, and applied, minimum rates for the transportation of property in local drayage, among other areas, since 1935. The application of these rates to interstate commerce moving wholly within San Francisco was challenged in 1940. (*In re Consolidated Freightways, Inc.*, 42 Cal. P.U.C. 721. Rev. den. Cal. Supreme Court, SF No. 1648, Injunction den. 36 F.Supp. 269, cert. den. 313 U.S. 561, reh. den. 313 U.S. 599 (1941)). The Commission determined that local distribution within San Francisco of interstate traffic was exempt from regulation by the Interstate Commerce Commission by virtue of 49 U.S.C. 303(b)(8), which exempts from federal regulation, except for qualifications, hours of service, safety of operations, and such transportation as is under a "common control, management, or arrangement for a continuous carriage," transportation wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities. Based on this determination, and the propo-

sition that where the federal government has not acted with respect to interstate commerce the state may do so if the matter is of local concern not requiring uniformity, the Commission concluded that the transportation in question was subject to the minimum rates prescribed by it and ordered the respondent to cease and desist from charging less than said minimum rates.

In 1949, after an investigation and formal hearing into the operations and practices of appellee Worth, the Commission ordered Worth to cease and desist from charging less than the minimum rates for the distribution, within San Francisco, of interstate pool car shipments. (Decision No. 42878, Case No. 5001, 48 Cal.P.U.C. 681.) Thereafter Worth complied with the Commission's order until 1961, when it filed an assembly and distribution tariff with the Interstate Commerce Commission under the permissive authority of 49 U.S.C. 1008, and began assessing the rates contained therein which are lower than the minimum rates. At or about this time other carriers filed assembly and distribution tariffs with the Interstate Commerce Commission and began assessing the rates and charges therein. These rates were also lower than the minimum rates prescribed by the California Commission for transportation of interstate traffic wholly within exempt commercial zones.

Facts Precipitating the Actions

On December 27, 1965, the Commission's staff sent a letter to a carrier distributing interstate shipments in the Los Angeles Commercial Zone for appellee Baltimore Shippers and Receivers Association, Inc., directing that carrier to cease and desist from charging less than the Commission's minimum rates for its services and to collect the undercharges pointed out in the attachment to the letter.

On March 22, 1966, the Commission issued its Order Reopening Investigation in Case No. 5001 to determine whether appellee Worth was violating the Commission's order of 1949.

On March 17, 1966, Case No. 8414, the Commission issued its Order Instituting Investigation of appellee G. I. Trucking Company to determine whether appellee was charging less than the minimum rates for transportation services in the distribution of property moving in interstate commerce within the Los Angeles Commercial Zone for shipper associations.

On March 17, 1966, in Case No. 8415, the Commission issued its Order Instituting Investigation of appellee Redway Truck and Warehouse Company for the same purpose noted for appellee G. I. Trucking Company.

The Complaints

On May 6, 1966, appellees Baltimore Shippers and Receivers Association, Inc., et al., filed a Complaint for Declaratory Judgment and Injunction and An Application for Three-Judge Court in the United States District Court, Northern Division of California. A Motion for Preliminary Injunction was filed the same day.

On May 19, 1966, appellees Charles J. Worth Drayage Company and Los Angeles Wholesale Institute filed a Complaint for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction, Declaratory Judgment, and Application for Three-Judge Court in the United States District Court, Northern Division of California. A Notice of Motion for Temporary Restraining Order and Motion for Consolidation was filed the same day.

On August 26, 1966, appellees G. I. Trucking Company and Redway Truck and Warehouse Company filed a Com-

plaint for Permanent Injunction, Declaratory Judgment, and Application for Three-Judge Court in the United States District Court, Northern Division of California.

Summary of Complaints

The plaintiffs (appellees) Baltimore Shippers and Receivers Association, Inc., The Charter Oak Shippers Cooperative Association, Inc., Industrial Shippers Association, Inc., United Shippers Associates, Inc., and Los Angeles Wholesale Institute are nonprofit associations of shippers as defined in 49 U.S.C. 1002(c) who ship freight in interstate commerce throughout the United States.

Plaintiffs (appellees) Charles J. Worth Drayage Company, G. I. Trucking Company and Redway Truck and Warehouse Company are motor carriers situated in California who perform break-bulk (the breaking up of a consolidated shipment into its component parts) and distribution services in California for nonprofit shipper associations, as well as general intrastate transportation services.

The shipper associations allege that the exemption in 49 U.S.C. 303(b)(8) means freedom from federal and state economic regulation.[2]

The motor carriers, on the other hand, allege that the above exemption applies in an alternative form, viz., that their operations wholly within commercial zones are subject to no economic regulation by express mandate of Congress, or, in the alternative, that their operations are subject only to the economic regulation of the Interstate Commerce Commission.

All plaintiffs (appellees) allege that California's scheme of regulation cannot constitutionally be applied to their

2. The term "economic regulation" is understood to refer to regulation of matters other than safety.

businesses because such application would regulate and control interstate commerce, thus creating a burden on interstate commerce and therefore would be in excess of the power of the State of California by reason of Article I, Section 8, of the Constitution of the United States; that Congress has preempted and occupied the field of economic regulation of interstate motor transportation of property and the action of the Commission is thus inconsistent by reason of Article VI, Paragraph 2, of the Constitution of the United States, and that the Commission's action violates Amendment XIV, Section 1, to the Constitution of the United States in that plaintiffs (appellees) will be deprived of their property without due process of law and denied equal protection of the law.

Relief Sought

All plaintiffs (appellees) in the above actions sought a declaration that Congress had preempted the field of regulation of interstate commerce by motor carriers through the comprehensive scheme of regulation contained in the Interstate Commerce Act (49 U.S.C. 301-327); that the imposition of California's minimum rates to the distribution services performed by motor carriers for appellee shipper associations wholly within commercial zones in California constitutes an unreasonable burden on interstate commerce in violation of the commerce clause of the Constitution of the United States; deprives plaintiffs of their property without due process of law and denies equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States; and requested that the Commission be permanently enjoined from applying and enforcing its minimum rates to said transportation.

Proceedings in the District Court

A hearing was held on May 31, 1966, on the Motions for a Temporary Restraining Order and Consolidation. No action was taken on the Motion for Temporary Restraining Order because such order became unnecessary after the Commission voluntarily took off its calendar the Orders Instituting Investigation of the appellee motor carriers. The cases were consolidated for trial.

On September 1, 1966, the Commission filed its Notice of Motion and Motion for Stay of Proceedings. This motion was made upon the grounds that a complaint had been filed before the Interstate Commerce Commission, the result of which could make the proceedings moot. The complaint was entitled *Shippers and Receivers Cooperative Association, Inc. v. G. I. Trucking Company*, Docket No. MC-C-34766. The complaint sought to prevent G. I. Trucking Company (appellee) from applying rates established by the California Commission to the distribution of plaintiff's traffic within the Los Angeles Commercial Zone.

The motion was heard and denied on September 16, 1966. The complaint to the Interstate Commerce Commission was dismissed by the plaintiff therein after the U.S. District Court filed its May 23, 1967 Opinion and Order.

On September 9, 1966, a pre-trial conference was held, wherein its was directed that counsel prepare a joint pre-trial order. The Joint Pre-Trial Order in Consolidated Cases was filed on December 19, 1966.

Trial commenced April 17, 1967 and continued through April 24, 1967. The District Court's Order Granting Permanent Injunction was issued and filed on May 23, 1967. On June 2, 1967 the District Court filed and entered an addendum to its Order directing plaintiffs (appellees) to prepare

an appropriate form of judgment consonant with the rulings of the court. A proposed order and objections thereto were considered. The Court thereafter, on September 7, 1967, filed and entered its final judgment.

Summary of Findings of Fact and Conclusions of Law by the District Court

The court included its findings of fact and conclusions of law in its 20-page opinion and order of May 23, 1967. In substance, the court found that Congress had preempted the field of economic regulation of interstate commerce for shipper association traffic transported by motor carriers wholly within commercial zones, and that the imposition of California's minimum rates upon this transportation constituted an unreasonable burden upon interstate commerce.

The court found that the nature of the regulation is economic regulation of interstate commerce which is not, practically speaking, capable of concurrent administration by both the state and federal governments. The court found that the legislative history with respect to the exemption of commercial zones in 49 U.S.C. 303(b)(8) was inconclusive and turned to the statute itself. The court found that the statute unambiguously exempts transportation wholly within commercial zones from federal regulation, but does not specifically spell out whether or not state regulation is envisioned or permitted.

The court found support for its conclusion that state regulation of the exempted transportation is precluded in *State Corporation Comm. v. Bartlett*, 338 F.2d 495 (10th Cir. 1964), Cert. den. 380 U.S. 964. In *Bartlett* the court held that the exemption of agricultural commodities in 49 U.S.C. 303(b)(6) preempted state regulation.

The District Court disagreed with the Commission's position that the legislative history exempting agricultural commodities from regulation clearly established the intent of Congress to leave transportation of agricultural commodities free from regulation, for the reason that *Bartlett* appeared to distinguish between rate regulation and other types of regulation practiced by the states. It found that rate regulation had commercial aims and thus was not as high on the scale of interests that the states could protect under the police power.

The court also relied upon *Railroad Transfer Service, Inc. v. Chicago*, 386 U.S. 351 (1967), to find that the Commission's argument that regulation by the State can be justified as a protection against destructive competition was without merit.

The Court found further support for its finding of preemption in the Freight Forwarder Act (Part IV of the Interstate Commerce Act, 49 U.S.C. 1001-1022). It found that the states are directly prohibited from regulating motor carriers performing distribution services for freight forwarders (49 U.S.C. 302(c)(2).) The Court found that the functions performed by freight forwarders and shipper associations are nearly identical with the exception of profit motive and service to the general public. The Court then looked to the exemption of shipper associations (49 U.S.C. 1002(c)(1)), and to the authority granted common carriers to file assembly and distribution tariffs for freight forwarders and others similarly situated (49 U.S.C. 1008), and found "that the comprehensive regulatory scheme of the Interstate Commerce Act, including both the Motor Carrier Act, Cf. *State Corporations Comm. v. Bartlett, supra,* and the Freight Forwarder Act and the nature of the subject

matter sought to be regulated required a finding that the field has been preempted by federal regulation." The Court expressly declined to make a finding on the question whether the Motor Carrier Act alone preempts the field.

This finding was made not only in the three-judge capacity of the Court, but also the original district judge found individually that he reached the same conclusion with respect to preemption.

The Court, acting in its three-judge capacity, found that the constitutional question presented under the commerce clause was not insubstantial and proceeded to consider the issue.

The Court found that even absent preemption the scheme of rate regulation the Commission seeks to impose violates the Commerce Clause of the United States Constitution. U.S. Const., Art. I, Sec. 8.

The Court found that the Commission's minimum rates would increase delivery costs in the commercial zone by 24 percent to 95 percent, which would increase the total delivery costs of the nonprofit shipper associations by 12 percent to 15 percent, resulting in a substantial economic burden on commerce. The Court further supported its finding by determining there was a violation of the "long and short haul principle" and that the Commission's rate structure would result in an interference with the free flow of commerce. The Court then concluded that the imposition of the Commission's minimum rates amounts to an unreasonable and unconstitutional burden on interstate commerce.

The District Court's Judgment of September ., 1967 ordered that the Commission be permanently restrained and enjoined from publishing, asserting and enforcing minimum rates under the authority of the law of the State of California for motor transportation service by motor carriers within exempt commercial zones for plaintiff shipper associations.

THE QUESTIONS ARE SUBSTANTIAL

The questions presented by this appeal are substantial and require plenary consideration by this Court. The questions are:

> Did Congress intend, by the enactment of Parts II (49 U.S.C. 301-327) and IV (49 U.S.C. 1001-1022) of the Interstate Commerce Act, to preclude the States from economic regulation of interstate transportation performed by motor carriers for nonprofit shipper associations wholly within commercial zones?
>
> Does the application of California's minimum rates to interstate transportation performed by motor carriers for nonprofit shipper associations wholly within commercial zones impose an unreasonable burden on interstate commerce in violation of the commerce clause of the Constitution of the United States?

Plenary consideration is necessary for these reasons:

1. This appeal presents to this Court for the first time the determination of the meaning and effect of Section 303(b)(8) of the Interstate Commerce Act by which Congress exempted local transportation by motor carriers of passengers and property within municipalities from economic regulation by the Interstate Commerce Commission. The lower court declined to construe the section and left its meaning and effect clouded and uncertain. Construction of the section by this Court is necessary to settle and define the regulatory powers of the States over transportation excluded from regulation by the Interstate Commerce Commission.

2. This appeal presents the question whether the Commerce Clause prohibits the exercise of regulatory powers of the States with respect to local transportation which Congress has expressly excluded from federal regulation. This question affects regulation of local transportation of pas-

sengers and property in every city of every state in the nation. It affects not only the regulation of local cartage of freight, but also the regulation of taxicabs and bus lines operating to and from railroad depots, bus terminals, and airports. Whether States and cities may lawfully apply uniform, nondiscriminatory regulations to such local services is a question of national importance.

3. This appeal presents to the Court for the first time the determination of the effect on Section 303(b)(8) of the Interstate Commerce Act of the enactment of Sections 1002(c)(1) and 1008 thereof. The former is in Part II, enacted in 1935; the latter sections are in Part IV, enacted in 1942. The lower court found preemption by reading those provisions of Part II (Motor Carrier Act) and Part IV (Freight Forwarder Act) together. That reasoning leaves in doubt the meaning and effect of Section 303(b)(8). Did Sections 1002(c)(1) and 1008 amend Section 303(b)(8)?

4. This appeal presents to the Court for the first time the question of the status of a nonprofit shipper association under Section 1002(c)(1) of the Act. Is such an association a carrier, or a shipper? Does Section 1002(c)(1) define a class of freight forwarder and exempt it from regulation under the Act, or is the Section merely a precautionary admonition to avoid possible misconstruction of the definition of freight forwarders as applying to a group of shippers consolidating their shipments to take advantage of volume rates? Does Section 1002(c)(1) confer upon a group of shippers some preferred status not enjoyed by a single shipper? The lower court's decision is unclear on the answers to these questions.

5. The lower court misapplied the holding of this Court in *Railroad Transfer Service, Inc. v. Chicago, supra.* That case involved transfer service between railroads—a motor

carrier service clearly subject to regulation by the Interstate Commerce Commission, and not within the exemption of Section 303(b)(8). If *Railroad Transfer* had involved independent taxicab operations to and from the railroad depots instead of transfer service under contract with the railroads between their depots, the decision would have been parallel to this case.

6. The lower court misapplied the holding of the Tenth Circuit Court in *State Corporation Commission v. Bartlett, supra.* That case involved the exemption of agricultural commodities under Section 303(b)(6). The case on appeal involves an exemption of local transportation which is not performed under common control, management or other arrangement for the through interstate movement. The distinction was overlooked by the lower court. The confusion requires clarification by this court.

7. The effect of the lower court's decision is to upset and overturn a well established portion of California's regulatory program. Since the *Consolidated Freightways* case, discussed at page 6, supra, the Commission has for over 20 years, fairly and effectively regulated interstate transportation within exempt commercial zones. Such regulation is an integral part of California's comprehensive regulatory program and its removal from the Commission's jurisdiction will replace harmony and stability with disruption and confusion.

8. The striking down of State legislation is a serious matter. A State law may not be struck down on the mere showing that its administration affects interstate commerce in some way. *Head v. New Mexico Bd. of Examiners,* 370 U.S. 424, 429 (1963). State regulation of interstate commerce, based on the police power, which does not discriminate against interstate commerce or operate to disrupt

its required uniformity, may constitutionally stand. *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440, 448 (1960). The exemption in question [49 U.S.C. 303(b)(8)] is clearly directed to relieving the [Interstate Commerce] Commission of the burdensome and highly expensive task of regulating purely local cartage operations. *Verbeem v. United States,* 154 F. Supp. 431, 434, affmd. 356 U.S. 676 (1957).

The questions presented by this appeal are important to large segments of the carrier industry and users of carrier service, and to the state and local governments. Whether States are to be prohibited from applying uniform nondiscriminatory regulation to motor carriers engaged in purely local service in interstate commerce which Congress has expressly removed from regulation by the Interstate Commerce Commission, and which does not conflict with federal regulation, is a question that requires determination by this Court.

The District Court Erred in Finding Preemption

Legislative History

In its consideration of the preemption question, the lower court first found that the legislative history of Section 303(b)(8) is inconclusive as to Congressional intent. Appellants respectfully submit that the finding is in error.

As pointed out in footnote four (4) of the lower court's opinion, Senator Wheeler, who introduced the bill containing Section 303(b)(8), clearly intended State regulation of commercial zone transportation. Notwithstanding the statement quoted from the author of the exemption, the lower court relied on a general statement taken from the House debates, which dealt with the overall proposition of regulation generally.

The lower court's quotation from the House debates is taken out of context. The full context is set forth below.[3] Mr. Sadowski, in reporting on the bill to the Committee of the Whole House, stated:

> "Legislation over interstate motor carriers, to be practical, must conform with the principles of regulation now in effect in the 48 States which regulate common carriers, and the 42 States that regulate contract carriers. The State Commissions have asked Congress to pass this bill so that there may be harmony between States as to motor-carrier regulation." 79 Congressional Record Part 11, p. 12204.

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3. "The States, generally, prohibit the use of their highways to common-carrier vehicles unless a certificate of public convenience and necessity is obtained after hearing in accordance with statute. The authority of a State to grant or deny a citizen the use of the public highways as a place of business is recognized.

In the case of *Stephenson v. Binford* (287 U.S. 251, 264) it was held that—

> It is well-established law that the highways of the State are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the legislature may prohibit or condition as it sees fit.

In the case of *Buck v. Kuykendall* (267 U.S. 307) the court held that a State could not regulate motor carriers operating in interstate commerce, and that the matter of control of carriers in interstate commerce was entirely in the hands of Congress to provide for Federal regulation.

This decision left the door wide open. It permitted all sorts of abuses by irresponsible operators at the expense of the intrastate motor carriers and other transportation agencies who were under strict State and Federal regulation.

After considering all the data at hand and the recommendations of the Interstate Commerce Commission, the Coordinator, the carriers themselves, and the public interest to be served, the committee believes that the bill as reported supplies the best possible regulation to preserve an adequate highway transportation system properly adapted to the needs of the commerce of the United States." Remarks of Mr. Sadowski of Michigan in presenting the bill to Congress, 79 Congressional Record Part 11, p. 12206.

Mr. Holmes, a member of the sub-committee which considered the legislation (Motor Carrier Act), stated:

> "In the legislation here created it makes it possible for the Interstate Commerce Commission to cooperate with bodies organized in the States. The State utility commissioners already have machinery set up to care for intrastate regulation. It is the *intent and purpose* of the legislation to use the machinery of the State in connection with the regulation of that portion which enters into interstate commerce." 79 Congressional Record Part 11, p. 12213. (Emphasis added.)

Thus it becomes clear that the House debate does not render Congressional intent inconclusive, but, rather it shows that Congress intended regulation by the States in exempt commercial zone areas.

Not only does the legislative history show a Congressional intent to leave the regulation of purely local transportation within commercial zones to the States, but the language and context of the statute itself can lead to no other conclusion.

The language of Section 303(b)(8) is unique and purposeful. It does not create the exemption of a class of commodities or traffic, or the complete exemption of transportation within the commercial zone. The exemption is restricted to transportation that is not under common control, management, or other arrangement for a continuous movement to or from a point outside the zone. Thus, Congress carefully defined the exempted transportation as that which is purely local drayage or cartage, and further, Congress conditioned the exemption of such local transportation by giving to the Interstate Commerce Commission the power to remove the exemption upon finding that Federal regulation is necessary to carry out the National Transportation Policy.

Such careful and specific language does not indicate an intent to leave the exempted transportation completely unregulated. On the contrary, it compels the conclusion that the intent was to leave the transportation to regulation by local authorities.

The intent of Congress to leave the regulation of certain motor carriers engaged in local operations to the States is further evidenced by 49 U.S.C. 304(a)(4a), which provides for the complete exemption of a carrier, or class of carriers, operating solely within a single State upon a finding by the Interstate Commerce Commission that such operations do not substantially affect or impair uniform regulation by the Interstate Commerce Commission in effectuating the National Transportation Policy.

The intent to supersede the exercise by the State of its police power as to matters not covered by the federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State. *Kelly v. Washington,* 302 U.S. 1 (1937).

The Agricultural Exemption

Having found the legislative history inconclusive, the lower court, without attempting to analyze the meaning and intent of Section 303(b)(8) inherent in the words of the section itself, turned to another exemption for aid in interpretation.

The lower court's reliance upon what it calls an analogous exemption (49 U.S.C. 303(b)(6)) and *State Corporation Commission v. Bartlett,* 338 F. 2d 495, cert. den. 389 U.S. 964 (1964) is misplaced. Section 303(b)(6)

exempts the transportation of unprocessed agricultural commodities from regulation. The *Bartlett* case holds that Congress intended to "occupy the field" in the transportation of agricultural commodities and thus precluded the State from regulation. The case is not grounded upon a distinction between rate regulation and other types of regulation, as the lower court would have it, but rather on the clear intent of Congress that the transportation of unprocessed agricultural products should not be regulated at all. This Court has also recognized such Congressional intent. *East Texas Motor Freight Lines v. Frozen Food Express,* 351 U.S. 49 (1956).

The Railroad Transfer Case

The lower court has misapplied this Court's holding in *Railroad Transfer Service v. Chicago, supra.* There it was unmistakably clear that jurisdiction over motor transportation between railroad depots within the terminal areas was vested in the Interstate Commerce Commission. Jurisdiction within Section 303(b)(8) commercial zones was not at issue. Therefore this case affords no support for the lower court's finding of preemption.

The Freight Forwarder Act

The lower court attempted to support its finding of preemption with the Freight Forwarder Act and the exemption of nonprofit shipper associations (49 U.S.C., 1002(c)(1)) therein. This is faulty reasoning.

It is illogical to say that 49 U.S.C. 1002(c)(1), which excludes shipper associations from any regulation whatsoever, and 49 U.S.C. 1008, which authorizes common carriers to file assembly and distribution tariffs for freight forwarders and others similarly situated, offer further

support for the finding of preemption. The argument does not fit the preemption theory.

First, the exemption of transportation within commercial zones in Section 303(b)(8) had been in effect for seven years when Congress enacted the Freight Forwarders Act in 1952. Congress had no intention that this act should amend Section 303(b)(8).[4]

Second, freight forwarders are carriers, shipper associations are merely groups of shippers. By providing against the possibility of shipper associations being considered freight forwarders, as it did in Section 1002(c)(1), Congress did not change such associations or other shipper groups into carriers. The lower court's failure to recognize this distinction led it to a serious misconstruction of Section 1002(c)(1) and its effect. The court finds an indication in Section 1002(c)(1) that "nonprofit shipper associations enjoy a preferred status within the scheme of national transportation." Preferred over whom, or with respect to what privileges or rights? Congress did not create any preferred status by the section. It only said that shippers, singly, in groups, or in associations, consolidating or distributing freight for the purpose of taking advantage of volume rates are not to be construed to be freight forwarders so long as they do so on a nonprofit basis.

Third, the authorization of assembly and distribution tariffs, as provided in Section 1008, has no relevancy to preemption. The purpose of the section was to permit carriers performing assembling and distribution service to file appropriate rates therefor which would be available

4. "This is a bill proposing to give a legal status to freight forwarders in the country." Opening remarks of Mr. Lea of California in reporting the bill to the Committee of the Whole House. 87 Congressional Record Part 8, p. 8212.

to freight forwarders and other shippers tendering shipments under similar circumstances.[5] The lower court draws from this authorization some inference that Congress intended to make those assembly and distribution tariffs applicable to transportation wholly within commercial zones. But that inference is not justified by the language of the section, or any legislative history. The exemption of motor carrier transportation within a commercial zone depends on whether it is purely local or whether it is performed under common control, management, or other arrangement for a continuous movement into or out of the zone. Section 1008 does not purport to make assembly and distribution tariffs applicable to transportation within commercial zones that is exempt under Section 303(b)(8). If transportation is exempt from regulation by the Interstate Commerce Commission, no tariff filed with it has application to that transportation. Section 1008 did not amend Section 303(b)(8).

Lastly, the lower court erroneously assumed, in trying to support its preemption finding, that the benefits of carload or volume rates, referred to in Section 1002(c)(1), extend beyond the break-bulk point. The consolidated shipments are entitled to the benefit of the carload or volume rates on the line-haul portion (terminal-to-terminal movement) of the shipment. The assembly and distribution rates are spe-

5. "Having concluded that joint rates between forwarders and carriers should be prohibited, but being desirous of preserving to the public existing forwarder service to the smaller points, insofar as this could be done in consonance with the national transportation policy enunciated in the Transportation Act of 1940, your committee gave consideration to the question of permitting carriers performing assembling or distribution service to make special rates therefor less than their regular rates which could be used by forwarders and other shippers under similar circumstances." 87 Congressional Record Part 8, pp. 8218-19.

cifically limited to less-than-carload or less-than-truckload shipments.[6]

Therefore the lower court's reliance upon the Freight Forwarder Act to find preemption is without support in fact or logical reasoning.

It is respectfully submitted that the lower court erred in finding that the interstate transportation wholly within exempt commercial zones has been preempted by the federal government.

The District Court Erred In Finding a Violation of the Commerce Clause

The lower court says, in effect, that even if there is not preemption, it is beyond the police power of the State to prescribe rates for the regulation of interstate transportation which is purely local in nature and which is specifically excluded from the economic regulatory provisions of the Interstate Commerce Act. If there is no preemption, then the problem resolves itself to the question of what power do the States have to regulate interstate commerce.

This Court has made it clear that the commerce clause does not prohibit all regulation of interstate commerce by the States. The subjects properly regulated by the States include: the size and weight limitation on motor vehicles;[7] prevention of fraud and deception;[8] direct consumer sales

6. "For the reasons indicated the language of section 408 has been drawn so as to limit its provisions to less-than-carload or less-than-truckload rates. The section contains no authority for the making of assembling or distribution rates or charges applicable on shipments tendered in carload or truckload lots." 87 Congressional Record Part 8, p. 8219.

7. *Maurer v. Hamilton*, 309 U.S. 598 (1940); *So. Carolina State H. Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938).

8. *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963).

of gas;[9] maintenance of sanitary conditions and adequate prices;[10] control of transportation of liquor;[11] the prevention of fraud and over-reaching by transportation agents;[12] the protection of the public from fraud and sharp practices on the part of insurance agents;[13] the fixing of maximum charges which warehousemen may charge tobacco growers;[14] and the control of air pollution.[15]

In addition to the above, this Court has recognized for well over a hundred years that the States may regulate and fix the rates of purely local interstate transportation under the local concern doctrine. The lower court's finding that economic regulation of such transportation is beyond the police power of the State completely ignores a long line of cases beginning with *Cooley v. Board of Port Wardens*, 53 U.S. (12 How.) 299 (1851), and further developed in *Port Richmond and Bergen Point Ferry Co. v. Board of Freeholders*, 234 U.S. 317 (1914) and *Wilmington Transportation Company v. Railroad Commission*, 236 U.S. 151 (1915).

The lower court cites *Ohio Railroad Com. v. Worthington*, 225 U.S. 101 (1912) for the proposition that a State may not impose direct economic burdens on commerce through the establishment of rates in the absence of compelling reasons. The *Worthington* case is distinguishable. There,

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9. *Panhandle Eastern Pipeline Co. v. Public Service Commission*, 332 U.S. 507 (1947).

10. *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346 (1939).

11. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939).

12. *California v. Thompson*, 313 U.S. 109 (1941).

13. *Robertson v. California*, 328 U.S. 440 (1946).

14. *Townsend v. Yeomans*, 301 U.S. 441 (1937).

15. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960).

the main question was whether the transportation involved was interstate in nature. The Court found that it was interstate by analogy to *Southern Pacific Terminal Co. v. Interstate Commerce Commission,* 219 U.S. 498 (1911) where the Court found similar interstate transportation to be subject to the jurisdiction of the Interstate Commerce Commission. Therefore, the Court held in *Worthington* that the State could not regulate such transportation.

In the instant case, the Commission has conceded that the transportation involved is interstate in nature. The question is whether such purely local interstate transportation was intended by Congress to be left to the States for regulation. It should also be noted that in *Worthington* the State attempted to apply a different rate from the one which applied to similar intrastate transportation. Appellant Commission applied the same rate for both interstate and intrastate transportation within local drayage areas.

The lower court cites a general proposition of law from the *Shreveport Rate Case, Houston and Texas Railway Co. v. United States,* 234 U.S. 342 (1914), "that the State cannot fix the relation of the carrier's interstate and intrastate charges without directly interfering with the former, unless it simply follows the standard set by the federal authority."

The lower court concedes that no federal rate has been set for the transportation in question. Furthermore, the court overlooks the fact that the transportation here is purely local in nature, and is not under a common control, management, or other arrangement for a continuous movement. Therefore, to rely upon a generalization from a case that does not fit the circumstances here results in an erroneous conclusion.

The Court further supports its conclusion that California's minimum rates impose an unreasonable burden on interstate

commerce by relying on the case of *Buck v. Kuykendall*, 267 U.S. 307 (1925) for the proposition that the commerce clause protects interstate commerce from actions by any state which result in an unreasonable disruption of the free flow of commerce. In the *Buck* case, the State of Washington attempted to apply its certification statutes to a carrier engaged solely in interstate commerce. In prohibiting such application, the Court was not at all concerned with purely local transportation, nor was the Court concerned with the exemption of such transportation from a comprehensive federal regulatory program. Thus again, the use of generalizations to apply to a specific and narrow situation leads the court to an erroneous conclusion.

If the lower court's conclusion that California's minimum rates impose an unreasonable burden on interstate commerce is based on the finding that they would increase transportation costs to nonprofit shipper associations, then the judgment cannot be sustained. For, if the State has the power to regulate, it can only be restricted if it exercises such power in an unreasonable manner. (*So. Carolina State Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177 (1938).) The lower court made no finding that California's minimum rates were unreasonable, and specifically declined (Footnote 6) in its opinion to make any finding "that the California rate structure was designed to be applied to motor carriers performing services for nonprofit shipper associations."

Lemke v. Farmers' Grain Co., 258 U.S. 50 (1922), which the lower court cites for the proposition that ". . . any indirect safety benefit which may accrue to the State through the imposition of higher tariffs and consequently higher profits will not suffice to support the measure as a safety measure." is not in point. The *Lemke* case involved the

regulation of the sale of a commodity—grain—and had nothing to do with safety.

The lower court, by relying upon general propositions of law from cases that have no direct relationship to the case at bar, has overlooked the fact that here we are dealing with a very limited and restricted area in interstate transportation, an area that has been specifically exempted from federal regulation by Congress.

The lower court's position ignores the thoroughly established principle that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so direct and positive that the two connot be reconciled or consistently stand together. *Kelly v. Washington,* 302 U.S. 1, 10 (1937).

There is no overlap of California's rate regulation with any federal regulation in the commercial zone area. Thus, the lower court ignores the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists. *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440, 448 (1960).

It is respectfully submitted that the lower court erred in finding that California's regulation is in violation of the commerce clause of the Constitution of the United States.

CONCLUSION

Probable jurisdiction of this appeal should be noted.

Respectfully submitted,

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(Appendices Follow)